

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES,

Plaintiff,

vs.

SHARLANDS TERRACE LLC, ET AL.,

Defendants.

3:04-CV-00292-LRH (VPC)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

March 8, 2007

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is the District Court's December 5, 2006 order recommitting the case to this court to determine the limited issue of whether service of the United States' first amended complaint was properly effectuated pursuant to Rule 5 (#292). On January 22, 2007, this court ordered supplemental briefing (#301). On February 7, 2007, the following parties filed supplemental briefs: plaintiffs Silver State Fair Housing Council, Inc. and Paul Babiak (#306/307); plaintiff United States (#309); defendant Jeff Codega Planning & Design (#308); defendants Sharlands Terrace, LLC, Blatt Development of Nevada, and Michael Blatt (#310); and defendants Windgate Apartments LP, 1930 Wright Street LLC, 5311 College Oak Drive LLC, 3859 Annandale Lane LLC, Sharlands Terrace Apartments I, LLC, and Sharlands Terrace Apartments II, LLC (#311). The court has thoroughly reviewed the record and the parties' objections and concludes that service was properly effectuated pursuant to Rule 5 of the Federal Rules of Civil Procedure.

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I. HISTORY & PROCEDURAL BACKGROUND

This action arises from alleged violations of the Fair Housing Act (“FHA”), 42 U.S.C. § 3604. The United States’ first amended complaint alleges that defendants discriminated against a handicapped individual with regard to the availability of rental units and the terms and conditions of those units, and also by failing to design and construct a dwelling in compliance with the accessibility and adaptability features mandated by the FHA (§164). Plaintiffs also allege that the violations committed by the defendants constitute a pattern or practice of resistance to – as well as denial of – the full enjoyment of rights granted to handicapped persons by the FHA, which constitutes violations of 42 U.S.C. §§ 3601-3619. *Id.*

Plaintiffs in this action are Paul Babiak (“Babiak”), the Silver State Fair Housing Counsel, Inc. (“Silver State”), and the United States. *Id.* Defendants include: Sharlands Terrace LLC, the original owner, developer, and manager of the Sharlands Terrace Apartments (“Apartments”) who, according to the allegations, was responsible for the design and construction of the Apartments; Jeff Codega Planing and Design, Inc. (“JCP&D”), the civil engineering firm responsible for the design and construction of the Apartments; James Tibbens DBA San Joaquin Design Group (“SJDG”), the architect responsible for designing the Apartments; Blatt Development of Nevada, Inc. and Michael T. Blatt (“Blatt”), the builder in the construction of the Apartments; and Windgate Apartments LP, 1930 Wright Street LLC, 5311 College Oak Drive LLC, 3859 Annandale Lane LLC, Sharlands Terrace Apartments I, LLC, and Sharlands Terrace Apartments II, LLC (“Current Owners”), who purchased the Apartments from Sharlands Terrace LLC. *Id.*

The United States filed its original complaint on June 4, 2004 (#2). On April 15, 2005, the Current Owners filed a motion for extension of time, requesting that the court’s scheduling

1 order be revised to extend the date to amend the pleadings and add parties (#82). Plaintiffs filed
2 notices of non-opposition to the Current Owners' motion for extension of time (#95, #97). On
3 June 29, 2005, the court granted the Current Owners' motion for extension of time; therefore, the
4 deadline to amend the pleadings under the Court's scheduling order was extended to June 14,
5 2005 (#106).

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7 Also on April 15, 2005, the United States filed a motion for leave to amend its complaint
8 to add Michael T. Blatt as a defendant (#78, #79). The United States attached a copy of the
9 proposed amended complaint to its motion and served both on all parties. *Id.* The motion was
10 unopposed. In a hearing on October 12, 2005, the court entered an oral order granting leave to
11 file the United States' first amended complaint (#163), and the complaint was docketed (#164).
12 The Current Owners were present at that hearing.

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14 On October 25, 2005, defendant JCP&D answered plaintiff United States' first amended
15 complaint (#167). Over six mediations held between September 2005 and June 2006, the parties
16 attempted to settle the case through private mediation. The mediation resulted in proposed
17 settlement terms.

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19 On June 2, 2006, the Current Owners filed an answer to plaintiff United States' first
20 amended complaint, which included a new cross-claim for violation of the FHA against
21 defendants JCP&D, Blatt and SJDG, as well as a previous cross-claim for professional
22 malpractice against JCP&D and SJDG (#202).¹ On June 16, 2006, the Current Owners filed an
23 amended answer that, in addition to the cross-claims, included a counterclaim against plaintiff
24 United States for a declaratory judgment that its attempt to enforce a consent decree between
25 plaintiffs and defendants JCP&D, Blatt and SJDG on the Current Owners would constitute an
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28 ¹ The Current Owners note that they had previously filed a professional negligence cross-claim
against JCP&D and SJDG that preceded their answer on June 2, 2006 (#223).

1 inverse condemnation and an unconstitutional taking under the Fifth Amendment (#210). JCP&D
2 filed a motion to strike untimely cross-claims, or in the alternative, motion to dismiss (#211), in
3 which Blatt and SJDG joined (#213 and #218, respectively). The United States filed a motion
4 to strike amended answers and alternatively, motion to dismiss counterclaim (#215), in which
5 Silver State joined (#221).
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7 On October 10, 2006, this court issued a report and recommendation granting JCP&D and
8 the United States' motions (#276). This court concluded that: (1) the Current Owners were
9 properly served with plaintiff United States' amended complaint because they were present at the
10 October 12, 2005 hearing in which the complaint was filed and they participated in the court's
11 electronic filing system; (2) the Current Owners filed their answer to the plaintiff's complaint
12 seven months after the deadline to file a responsive pleading had expired, without requesting or
13 receiving leave of court and without the stipulation of other parties in violation of Rule 15(a); (3)
14 the Current Owners filed cross-claims against defendants and counterclaims against plaintiff
15 United States, after the deadline to add parties in the court's scheduling order expired and without
16 filing a motion for leave to amend the pleadings or a motion to amend the scheduling order, in
17 violation of Rule 16(b); and (4) even if the Current Owners had filed a motion to amend the
18 scheduling order in relation to filing new cross-claims and counterclaims, they likely could not
19 show "good cause" under Rule 16(b), because the "good cause" analysis focuses on the diligence
20 of the party, and the Current Owners sat on their rights. *Id.* The court reinstated the Current
21 Owners' original answer and cross-claims filed on January 14, 2005. *Id.*
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24 Current Owners filed a timely objection to the report and recommendation (#279).
25 JCP&D and the United States each filed oppositions to the Current Owners' objection (#285 and
26 #286, respectively).
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On December 5, 2006, the District Court adopted this court's report and recommendation in part (#292). The District Court found that there were factual and legal questions regarding whether the Current Owners had been properly served with a copy of the United States' first amended complaint and therefore, whether the Current Owners had, in fact, failed to comply with Rule 15(a). *Id.* Noting that the parties had not raised many of the service issues before this court, the District Court referred the issue to this court to determine solely whether the Current Owners were properly served with a copy of the United States' first amended complaint pursuant to Rule 5. *Id.* The District Court instructed this court to clarify whether service was sufficient to meet Rule 5 on the facts of the case, focusing both on service based on actual notice and on the fact that the Current Owners were served with a copy of the proposed amended complaint on April 15, 2005 in conjunction with its motion for leave to amend the complaint. *Id.* Finally, in adopting this court's report and recommendation in part, the District Court found that the Current Owners did not object to this court's Rule 16(b) determination, and that no errors existed in this court's the Rule 16(b) analysis. *Id.* The District Court concluded that should this court find on remand that the Current Owners failed to comply with Rule 15(a), "no cause exists to allow an amended answer at this late date." *Id.*

II. DISCUSSION & ANALYSIS

A. Discussion

1. Federal Rule of Civil Procedure 15

Rule 15 of the Federal Rules of Civil Procedure states, in relevant part:

A party shall plead in response to an amended pleading within the time remaining for response to the original pleading, or within 10 days after service of the amended pleading, whichever time period may be the longer, unless the court otherwise orders.

FED.R.CIV.P. 15(a).

2. Federal Rule of Civil Procedure 5

Rule 5 requires that “every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants... shall be served upon each of the parties.” FED.R.CIV.P. 5(a). Service on parties represented by counsel shall be made on the party’s attorney. FED.R.CIV.P. 5(b)(1). Service under Rule 5 is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person’s office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person’s dwelling house or usual place of abode with someone of suitable age and discretion residing there.

(B) Mailing a copy to the last know address of the person served.
Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of court.

(D) Delivering a copy by any other means, including electronic means, consented to in writing by the person served. Service by electronic means is complete on transmission; service by other consented means is complete when the person making service delivers the copy to the agency designated to make delivery. If authorized by local rule, a party may make service under this subparagraph (D) through the court’s transmission facilities.

FED.R.CIV.P. 5(b)(2). “All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable amount of time after service.” FED.R.CIV.P. 5(d).

3. Local Rule of Practice 15-1

United States District Court for the District of Nevada Local Rule 15-1 sets out the local

rule for filing amended pleadings. The version of Rule 15-1 effective in 2005 states in relevant part:

(a) The original proposed amended pleading shall be signed and attached to any motion to amend a pleading...

(b) ... The time under Fed. R. Civ. P. 15(a) for an entity already a party to answer or reply to an amended pleading shall run from the date of service of the order allowing said pleading to be amended...

L.R. 15-1 (Rev. 12/1/2000).

B. Analysis

The District Court instructed this court to address the limited issue of whether service of the United States' first amended complaint was sufficient to meet the requirements of Rule 5 on the facts of the case (#292). The District Court directed this court to focus on service based on actual notice and on the fact that the Current Owners were served with a copy of the proposed amended complaint when the United States' April 15, 2005 motion for leave to amend was filed. *Id.*²

1. Service of the United States' Proposed Amended Complaint

The first issue is whether service of the United States' proposed amended complaint on April 15, 2005 with its motion for leave to amend is sufficient to meet the requirements of Rule 5. The court concludes that, under the facts of this case, it is.

² The Current Owners argued before the District Court that this court was mistaken in concluding that the Current Owners were served with a copy of the United States' amended complaint through the court's electronic filing system because the filing system did not go into place until January 1, 2006 (#279). In concluding in its report and recommendation that the United States had served the Current Owners via the electronic filing system, this court relied on the United States' contention that it had so served the Current Owners. *See* # 215, p.8 ("On October 12, 2005, the United States served its First Amended Complaint on the Current Owners by electronic and regular mail"); *see also* #254, p. 4. The Current Owners responded by arguing only that they did not have a copy of the served first amended complaint in their file (#238, p.3). The electronic filing system was not active in October 2005, but the parties did not address this fact (#292).

1 JCP&D and the United States point out that the United States served the Current Owners
2 with a signed copy of its proposed first amended complaint on April 15, 2005 when the United
3 States filed its motion for leave to amend (#s 285, 286, 308 and 309). The parties argue that
4 nothing in Rules 5 or 15 requires a party, after the court grants a motion for leave to amend a
5 complaint, to serve an amended pleading a second time when the moving party has already served
6 a copy of the proposed amended complaint. *Id.*

8 Both parties cite *Williams v. Clinch County, Ga.*, 231 F.R.D. 700 (M.D. Ga. 2005), in
9 which the plaintiff had served on defendants a copy of its proposed amended complaint along
10 with its motion for leave to amend. *See* #309, pp. 4-5 and #308, p. 2 (*citing Williams v. Clinch*
11 *County, Ga.*, 231 F.R.D. 700 (M.D. Ga. 2005)). At issue in *Williams* was, after the court had
12 granted the plaintiff's motion for leave to amend and accepted the amended complaint for filing,
13 when the ten-day time period to file an amended answer pursuant to Rule 15(a) began to run.
14 *Williams*, 231 F.R.D. at 701. Stating that "service and filing with the court do not have to be
15 mutually exclusive," the court held that when the time begins to run depends on when the court
16 accepts the amended complaint for filing. *Id.* at 701-702. The court stated:

19 [T]he proposed amended complaint had yet to be accepted by the
20 Court when it was served; thus the trigger starting Rule 15(a)'s
21 ten-day period is [the] date on which the Court accepts the
22 amended complaint as the operative complaint. The trigger date
in this case is May 19, 2005, the date this Order was entered on the
docket.

23 *Id.* at 702. In so finding, the court concluded that service of the proposed amended complaint was
24 sufficient. *Id.* The United States contends that the court in *Williams* did not read into the rules
25 a requirement that a proposed amended complaint be served a second time after it is filed by the
26 court (#309, p. 5). The United States acknowledges that although a court may order a plaintiff
27 to serve a copy of the amended complaint on defendants after it orders the amended complaint
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1 filed, there was no such order in this case. *Id.*, p. 5 (citing *Blackwelder v. Safnauer*, 689 F. Supp.
 2 106, 114 n.3 (N.D.N.Y. 1988)). Both parties note that this court ordered that defendants answer
 3 “in normal course,” and assert that pursuant to *Williams*, this means within ten days after the court
 4 ordered the amended complaint filed. *Id.*, p. 6; *see also* #308, p. 3.³

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 6 With reference to the issue of service of the proposed amended complaint, the Current
 7 Owners argue in their supplemental brief only that it is “undisputed” that the amended complaint
 8 was not served pursuant to the requirements of Rules 5 and 15 (#311). Notably, in all of their
 9 filings with this court, the Current Owners have failed to directly address or cite to any cases with
 10 regard to the first issue – whether service of the proposed amended complaint on April 15, 2005
 11 constitutes proper service under Rule 5 (#s 223, 238, 279, and 311).⁴ This is contrary to the
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 14 ³ Plaintiffs Silver State and Babiak make similar arguments and additionally argue that this court is
 15 the only forum in which Silver State and Babiak may receive relief, unlike the Current Owners, who can “file
 16 their claims in another forum” (#307). Sharlands Terrace, LLC, Blatt Development of Nevada and Michael
 17 Blatt (“Blatt defendants”) argue that pursuant to the District Court’s August 22, 2005 order (#137), the Blatt
 18 defendants were specifically submitted to arbitration (#310). Since the arbitration has been ongoing for
 almost a year, even if the court were to find that the Current Owners were not served with a copy of the
 amended complaint, the Current Owners’ cross-claims against the Blatt defendants would be subject to a
 motion to strike based on the order of arbitration under the law of the case doctrine. *Id.*

19 ⁴ This court conducted a review of all of the Current Owners’ past motions to determine whether the
 20 Current Owners addressed the April 2005 proposed amended complaint service issue. In their opposition
 21 to JCP&D’s motion to strike, the Current Owners actually stated, “In October of 2005, some four month after
 the deadline to amend the pleading, plaintiffs had been granted leave to amend their complaints. They did
 so, *filing and serving First Amended Complaints on October 13, 2005*” (#238, p. 4) (emphasis added). The
 Current Owners do not mention the April 2005 service issue.

22 In their July 19, 2006 opposition to the United States’ motion to strike, the Current Owners asserted
 23 for the first time that they do not have a served copy of the United States’ amended filed complaint in their
 file (#238, p. 3). However, this appears to be in reference to the October 2005 actual notice service issue,
 not the April 2005 proposed amended complaint service issue. *Id.*

24 In their objection to this court’s report and recommendation, the Current Owners’ arguments focus
 25 on the October 12, 2005 hearing, *see* #279, pp. 2-3 and 6-7, and fail to specifically address the United States’
 service of the proposed amended complaint in April 2005. *Id.*

26 Finally, in their supplemental brief, the Current Owners merely argue that it is “undisputed” that the
 27 amended complaint was “not served in accordance with Rule 5 and Rule 15 of the Federal Rules of Civil
 Procedure,” and proceed to discuss Local Rule 15-1 and the rules of default (#311). Although they indirectly
 28 allude to it by arguing they were not served, Current Owners do not directly address *why* service of the
 proposed amended complaint in April 2005 was not sufficient.

1 District Court's direction (#292) and this court's order for supplemental briefing (#311).

2 A review of the court's docket reveals that the United States filed a certificate of service
3 stating that it served the Current Owners with a copy of its motion for leave to amend its
4 complaint, a memorandum in support, a proposed order, and its first amended complaint by
5 regular mail on April 14, 2005 (#78, pp. 3-5). The Current Owners do not deny that they received
6 a copy of the proposed first amended complaint.
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8 Rule 5 is silent regarding whether a party must serve an amended complaint after it is
9 accepted for filing where the party has already served a copy of the proposed amended complaint.
10 The United States and JCP&D's cited case, *Williams*, is from the Middle District of Georgia and
11 is, therefore, not controlling authority. The Current Owners fail to cite any cases at all addressing
12 this issue. The court's own research failed to turn up case law that contradicts the holding in
13 *Williams* or a Ninth Circuit case that addresses this issue on point.
14

15 In granting the United States' motion to amend the complaint, this court ordered that
16 "defendants shall answer in normal course" (#301). The United States and JCP&D assert that "in
17 normal course" means ten days after the court ordered the amended complaint filed (#309, p. 6;
18 #308, p. 3). The Current Owners argue that "in normal course" means the parties must proceed
19 according to the rules, which can only mean they were required to answer *after* they were served
20 with a copy of the amended complaint by one of the methods outlined in Rule 5(b) (#279). The
21 Current Owners argue that because the *filed* first amended complaint was never served pursuant
22 to the provisions of Rule 5, the ten-day time period in which to file a responsive pleading under
23 Rule 15(a) was never triggered. *Id.*
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26 It is evident that the court should have been more clear in its instruction to the defendants
27 to answer "in normal course." To clarify, in stating "defendants shall answer in normal course,"
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1 the court intended, and indeed assumed, considering all parties are ably represented by counsel,
2 that the parties would consult the local and federal rules and answer according to the time
3 requirements therein.⁵ Rule 15(a) provides that the ten-day time period to file a responsive
4 pleading does not begin until the amended pleading has been served. FED.R.CIV.P. 15(a). Local
5 Rule 15-1, as it existed in 2005, provided that the time for an entity already a party to answer an
6 amended pleading “shall run from the date of service of the order allowing such pleading to be
7 amended.” L.R. 15-1(b) (Rev. 12/1/2000). Implicit in this rule is that the amended pleading is
8 already served when the time begins to run. There was no requirement in the local rule that the
9 amended complaint be re-served. Moreover, the first sentence of Local Rule 15-1 required that
10 “[t]he original proposed amended pleading shall be signed and attached to any motion to amend
11 a pleading.” L.R. 15-1(a) (Rev. 12/1/2000). In other words, pursuant to Local Rule 15-1 as it
12 existed at the time, in order for the ten-day time period to begin, it was assumed that service was
13 previously effectuated; the only way this would have happened pursuant to the local rule is
14 through attaching the proposed amended pleading to the motion to amend and serving it on the
15 parties pursuant to Rule 5(b). This is exactly what the United States did in this case (#78, #79).

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19 The Current Owners argue that the Local Rule 15-1(b) time trigger is invalid because it
20 conflicts with Rule 15(a), in that the local rule requires the ten-day period to begin upon “service
21 of the order” allowing the amended pleading, but Rule 15(a) requires the ten-day time frame to
22 begin on “service of the amended pleading” itself (#311, p. 3). The court finds that there is no
23 conflict here; as stated above, Local Rule 15-1 implicitly requires that service be completed
24 before the court grants the motion to amend. Under this interpretation, the service requirements
25 of Rule 15(a) are met through service of the “original proposed amended pleading.” Since the
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28 ⁵ The court also assumes that parties will file a motion for clarification should the court’s instructions
be confusing or unclear.

1 court finds no conflict between the rules, the court rejects the contention that Local Rule 15-1 is
2 invalid.

3 The Current Owners additionally contend that because “permission to file the amended
4 complaint here was granted in open court and reflected in the minutes of the court,” there was no
5 “written” order served, and therefore, the ten-day time period was never triggered (#311). This
6 is simply incorrect. The court’s oral October 12, 2005 order granting the United States’ motion
7 to amend is memorialized and reflected in the *written* minutes of the court. *See* #163 (“IT IS
8 ORDERED that the plaintiff’s motion for leave to amend to file first amended complaint (#81)
9 is GRANTED. The clerk is directed to detach the proposed amended complaint from this motion
10 and file it as of today’s date. The defendants shall answer in normal course.”). Minutes of the
11 court are written orders and are served on all parties to a case. Therefore, the ten-day time period
12 was triggered when the court served the Current Owners with this minute order.
13

14 The court concludes that the United States properly served the Current Owners when it
15 served a copy of the proposed amended complaint with its motion to amend on April 15, 2005.
16 This was sufficient to meet the requirements of Rules 5 and 15. Pursuant to Local Rule 15-1, the
17 ten-day time period to file a responsive pleading was triggered upon service of the court’s minute
18 order of October 12, 2005.
19

20 **2. Actual Notice**

21 Although the court has concluded the United States served its amended complaint on the
22 Current Owners, the court addresses the actual notice issue at the direction of the District Court.
23 The issue is whether actual notice of an amended pleading is sufficient to meet the requirements
24 of Rule 5. The court concludes that while actual notice alone is not enough to meet the
25 requirements of Rule 5(b), the United States has a compelling reason for not serving the Current
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1 Owners with a second copy of its amended complaint.

2 The Ninth Circuit has held that actual notice alone does not constitute valid service
3 pursuant to Rule 5(b) and is, therefore, not an exception to the service rule. *Magnuson v. Video*
4 *Yesteryear*, 85 F.3d 1424, 1431 (9th Cir. 1996). However, if a party advances “some other
5 compelling circumstance” in addition to actual notice, the failure to comply with Rule 5(b) is
6 excused. *Id.*

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8 The United States argues that the Current Owners had “actual notice” of its amended
9 complaint because they were served with the proposed amended complaint in April 2005 and
10 were present at the hearing in which this court ordered the amended complaint filed (#309, p. 7).
11 The United States contends that “exceptional good cause” for not serving a second copy of the
12 amended complaint after the court ordered it filed exists because the Current Owners proceeded
13 thereafter as if they had been served. *Id.* The United States points out that the Current Owners
14 filed a status report with the court in April 2006, which stated that the Current Owners intended
15 to proceed with discovery and depositions in relation to Michael Blatt, who had been added as
16 a defendant in the United States’ amended complaint. *Id.*, p. 7. The United States contends that
17 the Current Owners did not argue in their status report or in any other filings that they had not
18 been served with a copy of the United States’ amended complaint. *Id.* The Current Owners only
19 made this argument after the parties filed motions to strike the Current Owners’ answer. *Id.* As
20 such, the Current Owners should be estopped from arguing that they were not served. *Id.*

21
22 JCP&D argues that an additional compelling circumstance is that the Current Owners are
23 trying to “derail” the months of settlement negotiations the parties conducted, which is prejudicial
24 to all parties (#308, p. 4). Prejudice exists because if these proceedings are allowed to drag on,
25 the defendants will have to re-negotiate the repairs with the Current Owners’ expert, the plaintiffs
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1 will not receive the monetary settlement the defendants have agreed to pay, and the Sharlands
2 Terrace Apartments will remain non-compliant with the FHA during this time. *Id.* JCP&D argue
3 that this case began as an FHA case, and now the Current Owners are attempting to bring other
4 claims two years after the case began, with the intent of recovering attorneys fees. *Id.*

5
6 The Current Owners did not address *Magnuson* or the “exceptional good cause” argument
7 in their supplemental brief (#311). In previous filings, the Current Owners argued that: the
8 United States filed no proof of service after its amended complaint was accepted for filing (#238,
9 p. 3); failure to file such proof is fatal to the United States’ claim that the Current Owners were
10 served (#279, p. 2); Rule 5(b) does not provide that being “in the room” when the court orders
11 the amended complaint filed constitutes service, *id.*; service had to be effectuated by some
12 method specified in Rule 5(b), *id.*; and that it is undisputed that the United States did not serve
13 its filed amended complaint pursuant to Rules 5 and 15 (#311, p. 2).

14
15 The court agrees that it is undisputed that the United States did not serve the Current
16 Owners with a copy of its *filed* amended complaint. The Current Owners were present at the
17 October 12, 2005 hearing in which this court ordered the clerk to file that the United States’ first
18 amended complaint, *see* #163; therefore, Current Owners had actual notice of the amended
19 complaint. Pursuant to *Magnuson*, there must also be a compelling reason or exceptional good
20 cause for not serving the filed complaint. *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1431
21 (9th Cir. 1996).

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23 The court concludes that good cause exists for failure to serve the filed amended
24 complaint. First, the court’s order granting leave to amend and file the complaint required the
25 defendants to answer “in normal course,” which meant the parties should consult the federal and
26 local rules. Local Rule 15-1 as it existed at the time directed the Current Owners to file a
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responsive pleading within ten days of the court's order. Clearly, Local Rule 15-1 set out the time frame in which to respond. The parties were permitted, and in fact, were required, to rely on Local Rule 15-1. Second, it is true that all parties, including the Current Owners, proceeded as if the amended complaint had been served. In addition to implicitly acknowledging the amended complaint in their April 2006 status report, *see* #193, the Current Owners actually stated in their response to JCP&D's motion to strike that they were served with the amended complaint in October 2005. *See* #223 ("In October of 2005... plaintiffs had been granted leave to amend their complaints. They did so, filing and serving First Amended Complaints on October 13, 2005"). This indicates that the parties assumed the amended complaint had been served and had proceeded in the case in reliance on that assumption. For all these reasons, the court concludes there was good cause for not re-serving the complaint.

3. Other Arguments

The Current Owners additionally argue that there is no provision in the Federal Rules to "strike" an untimely responsive pleading (#311, pp. 3-4). They contend that the only remedy available to the plaintiffs and the co-defendants was to pursue a default judgment under Rule 55, which they did not do, and argue: nothing in the Federal Rules of Civil Procedure authorizes the court to impose sanctions on Current Owners, "whether the answer is filed on the 11th day or the 111th day;" striking the Current Owners' answer is akin to a *sua sponte* default judgment; as long as the plaintiffs and co-defendants do not pursue a default judgment, "they effectively grant an extension of time to answer"; and the scheduling order set no time for answering amended pleadings.⁶ *Id.*

⁶ The Current Owners also argue that because this court essentially ordered a default judgment against them, "court-ordered" defaults should also be entered against the Blatt defendants and Tibbens, neither of whom have answered the amended complaints to this date (#311). The court notes that the other parties' failure to file responsive pleadings is not at issue here.

1 The court finds that the Current Owners have waived this argument. Whether the court
2 has the authority to strike a responsive pleading is not before the court at this time. The issues
3 before the court are limited to the those set out by the District Court in its December 5, 2006 order
4 (#292). This argument should have been made in the Current Owners' opposition to the parties'
5 motions to strike, or, at a minimum, should have been included in the Current Owners' objections
6 this court's October 10, 2006 report and recommendation. Therefore, the court will not consider
7 the default argument.
8

9 III. CONCLUSION

10 Based on the foregoing, the court concludes that the United States' service of its proposed
11 amended complaint on April 15, 2005 constituted proper service pursuant to the Federal and
12 Local Rules of Procedure. The court additionally concludes that the Current Owners had actual
13 notice of the amended complaint and the United States had a compelling reason for not serving
14 the Current Owners for a second time, namely, this court's order that the defendants answer "in
15 normal course," Local Rule 15-1, and the fact that all parties proceeded in the litigation as if the
16 United States had properly served them.
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18 The parties are advised:
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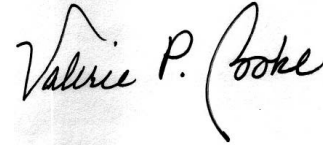
20 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
21 the parties may file specific written objections to this report and recommendation within ten days
22 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
23 Recommendation" and should be accompanied by points and authorities for consideration by the
24 District Court.
25

26 2. This report and recommendation is not an appealable order and any notice of appeal
27 pursuant to FED. R. APP. P. 4(a)(1) should not be filed until entry of the District Court's judgment.
28

IV. RECOMMENDATION

IT IS THEREFORE RECOMMENDED and concluded that service was properly effectuated pursuant to Rule 5 of the Federal Rules of Civil Procedure.

DATED: March 8, 2007.

A handwritten signature in black ink, reading "Valerie P. Cooke". The signature is written in a cursive style with a large, stylized 'V' and 'C'.

UNITED STATES MAGISTRATE JUDGE